SUPREME COURT OF THE UNITED STATES.

No. 114.

NEIL, MOORE & CO., PLAINTIFFS IN ERROR,

vs.

THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF OHIO.

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J. & G. S. GIDEON, printers.

THE STATE OF OHIO, *Franklin county, ss.*

At a supreme court of the State of Ohio, begun and held at the court-house, in the city of Columbus, within and for the said county of Franklin, before the honorable Matthew Burchard and Nathaniel L. Read, judge thereof, on the first day of December, in the year of our Lord one thousand eight hundred and forty-three, there were, among others, the following proceeding, to wit:

THE STATE OF OHIO, } Ass't.
vs. }
NEIL, MOORE & CO. }

Be it remembered, that heretofore, to wit, on the 29th day of October, in the year of our Lord one thousand eight hundred and forty-three, Neil, Moore & Co., deposited in the clerk's office of the supreme court of the county of Franklin aforesaid, the original papers and pleadings on a certain cause therein, lately pending in the court of common pleas of Franklin county aforesaid, wherein the State of Ohio was plaintiff, and Neil, Moore & Co., were defendants, which said cause has been duly appealed to the supreme court aforesaid, and which said original papers and pleadings, together with an authenticated abstract of the journal, entry, and final judgment made and rendered in said cause by the said court of common pleas, are in the words and of the tenor following, that is to say:

"*Writ.*"

THE STATE OF OHIO, *Franklin county, ss.*

To the sheriff of said county, greeting:

We command you to summon William Neil, David W. Deshler, William S. Sullivant, Richard H. Hubbell, Darius Tallmadge, Otho Hinton, Frederick W. Fowler, Kimball Porter, and William Sellars, to appear before the honorable the judges of the court of common pleas of said county, at the court-house, in Columbus, on the first day of our next term, to answer unto the State of Ohio on a plea of assumpsit, damages $10,000, and have then and there this writ.

Witness Lyne Starling, jr., clerk of our said court, at the court house aforesaid, this 4th day of October, anno domini 1842.

[SEAL.] Attest, L. STARLING, JR., *Clerk.*

"*Endorsement.*"

"Suit brought for tolls on passengers conveyed in stages by defendants, on the National road, in the State of Ohio; also for goods sold and delivered, goods bargained and sold, money lent, paid, and account stated, &c., October 4, 1842.

SWAYNE & BATES,
Attorneys for plaintiff.

"*Return.*"

"We acknowledge service for *the* each of the within named defendants, October 9, 1842.

PERRY & DENNISON,
Attorneys for defendants."

"*Declaration.*"

THE STATE OF OHIO, *Franklin county, ss:*

Court of common pleas, September term, A. D. 1842.

The State of Ohio, plaintiff in this suit, complains of William Neil, David W. Deshler, William S. Sullivant, Richard H. Hubbell, Darius Tallmadge, Otho Hinton, Frederick W. Fowler, Kimball Porter, and William Sellers, late partners, trading in the name and style of Neil, Moore & Co., in a plea of assumpsit, for that whereas the said defendants, on the first day of September, A. D. 1842, at Franklin county aforesaid, being indebted to the said plaintiff in the sum of ten thousand dollars, for tolls before that time due and payable to said plaintiff, for tolls at certain toll gates on the National road, and through said gates, in coaches, stages, and other four-wheeled vehicles, the property of the said defendants, afterward, to wit, on the day and year, and at the place aforesaid, undertook and promised the said plaintiff to pay to said plaintiff said sum of ten thousand dollars, yet the said defendant, although often requested so to do, has not paid said sum, nor any part thereof, to the damage of said plaintiff ten thousand dollars, and therefore said plaintiff brings suit, &c.

SWAYNE & BATES,
Attorneys for plaintiff.

Which said declaration, by consent of parties, was filed on the first day of April, eighteen hundred and forty-three.

"*Plea.*"

"NEIL, MOORE & Co., ads.
STATE OF OHIO.

Franklin court of common pleas.

And the said defendants come and defend, &c., and say, that they did not assume and promise, in the manner and form as the said plaintiff hath declared against them, and of this they put themselves upon the country, and the said plaintiff doth the like.

By PERRY & DENNISON, *their Attorneys.*"

And thereupon, the following agreed statement of facts by the parties was filed in this case, and which said agreed statement of facts are in the words and of the tenor following, to wit:

"THE STATE OF OHIO,
vs.
NEIL, MOORE & CO.

Franklin common pleas.

In this case, the following facts are agreed by the parties: the partnership of the defendants, as alleged, is admitted. The plaintiff claims to recover for tolls on passengers carried upon the National road, in Ohio, in coaches belonging to the defendants, other than and besides one daily stage coach, carrying the mail of the United States, which said coach, with the horses, passengers, and every thing else pertaining to it, was permitted to pass toll free. The order of the board of public works, hereto annexed, was made, in due form, at the date thereof, and is to be admitted in evidence. The passengers upon whom toll is sought to be recovered, *was* carried by the defendants, as above mentioned, between the first days of April and October, A. D. 1842. The defendants were contractors for carrying the mail of the United States upon said road, and said passengers were all carried in coaches in which a part of said mail was carried at the same time, the mail being thus carried in more than one coach, pursuant to orders from the Postmaster General—one coach, containing a part of the mail, and the passengers, and baggage, and every thing on it, being, at the same time, permitted to pass toll free, as above stated. The mail was carried in one line of coaches, down to the time stated in the annexed statement of the Postmaster General, which, together with the accompanying orders of the Department, are taken in evidence in this case. Both before and since the construction of the National road, it was the uniform practice, in Ohio, to carry passengers on the coaches carrying the mail, and since the construction of the National road, no claim was made for toll on such passengers or coaches, or on any thing pertaining to them, except as shown by the case of the State of Ohio vs. Neil and Moore, in 7th Ohio Rep. p. 132, until the mail was carried in two separate lines of coaches, as specified in the said statement of the Postmaster General, and in the manner and for the purpose therein mentioned, the defendants were required to carry the mail in two separate lines of coaches, and did so carry it accordingly. It is admitted that the acts of the legislature of Ohio, and the orders of the board of public works, in existence when the tolls in question accrued, did not reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the said road, to the erection of gates and toll-houses thereon, and for the payment of the fees or salaries of the superintendant, the collectors of tolls, and of such other agents as may be necessarily employed in the preservation and repair of the same, but it is not intended by this admission to preclude the defendants from objecting to the validity or legality of said charge of toll upon passengers, upon *passengers*, *upon* any ground they may think proper to take in the argument. It is understood and agreed that this case shall not in anywise prejudice the rights of the plaintiff, nor of the defendants, in

any other suit, upon any demand not included in the facts hereby agreed. For the mutual convenience of the parties, this case is narrowed down so as to present only the question arising upon the facts above stated. Any material fact left out in this agreement, may be supplied, by proof, on the trial, by either party, after giving the other party reasonable notice of such intention. It is agreed by the parties that the whole number of passengers charged with toll at all the gates, between the first days of April and July, A. D. 1842, was ten thousand seven hundred and fifty-six, and that the whole number chargeable between the first day of July and October, A. D. 1842, was twelve thousand six hundred and seventeen, and that if the plaintiff be entitled to recover, judgment shall be entered for the sum of $1,075 $\frac{58}{100}$, with interest from the first day of July, 1842, and $1,261 67½, with interest from the first day of October, A. D. 1842, and costs, or for such other sums as may be due, computing the tolls on said passengers at any other rate than that fixed by the board of public works, if the court deem it competent to adopt any other rate, with interest on the gross sums due on the first days of July and October, above mentioned, from those times respectively, and costs.

April 17, 1843.

SWAYNE & BATES,
Attorneys for plaintiffs.
PERRY & DENNISON,
Attorneys for defendants."

"*Abstract.*"

"THE STATE OF OHIO, *Franklin county, ss:*

Franklin common pleas, May term, 1843.

STATE OF OHIO,
vs.
NEIL, MOORE & Co. } Assumpsit.

Be it remembered, that heretofore, to wit, at the February term of said court, in the year of our Lord A. D. 1843, this cause was continued. And now, at this day, to wit, the day and year first herein aforesaid, came the parties, by their attorneys, and submit this cause to the court upon the issue joined. Whereupon, the court being fully advised in the premises, do find that the said defendants did assume and promise, in manner and form as the said plaintiff, in its declaration, has alleged, and do assess the plaintiff's damages, by reason of the premises, to the sum of $2,438 25; therefore it is considered, that the plaintiff recover of the said defendants the said sum of $2,438 25 damages, so assessed as aforesaid, and also the costs in this behalf expended, taxed at
dollars; and thereupon the defendants, by counsel, gave notice of his intention to appeal this cause to the supreme court, next to be holden in this county, and did appeal accordingly.

THE STATE OF OHIO, *Franklin county, ss:*

I, Lyne Starling, jr., clerk of the court of common pleas of said county, certify the foregoing to be a correct abstract from the journal, entries,

and final order made in the case of The State of Ohio vs. Neil, Moore & Co., and that said defendants gave bond on said appeal, according to law.

Witness my hand and the seal of said court, at Columbus, this 29th October, A. D. 1843.

[SEAL.]

L. STARLING, JR., *Clerk.*"

And now, at this day, to wit, the day and year first herein aforesaid, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and forty-three, came the parties, by their attorneys, and submit this cause to the court upon the issue joined. Whereupon, the court having heard the arguments of counsel, and being fully advised in the premises, do find that the defendants did assume and promise, in manner and form as the plaintiff, in its declaration, has alleged, and do assess the plaintiff's damages by reason thereof, to the sum of $2,516 90; therefore it is considered, that the plaintiff recover against the said defendants the said sum of two thousand five hundred and sixteen dollars and ninety cents, the damages so by the court assessed, and also the costs in this behalf expended, taxed at dollars.

And it is hereby certified, that on the trial of this cause, the defendants set up and claimed the right and authority to transport, in their two daily lines of mail coaches, which carried the United States mail, under a contract with the Postmaster General, and by the authority of the United States, passengers travelling therein, free of toll, along the United States road, in the State of Ohio, and through the toll-gates erected by the said State thereon; that the said defendant set up and claimed this power and authority under and by virtue of the act of Congress, approved the 2d day of March, A. D. 1831, entitled, " an act declaring the assent of Congress to the act of the general assembly of the State of Ohio," recited therein; and that in said case there were drawn in question, the construction, effect, and validity of said act of Congress, and the right and authority claimed by the said defendants under the United States, by virtue thereof, and that the decision was against the validity of said act to confer the right and authority so claimed.

THE STATE OF OHIO, *Franklin county, ss:*

I, Lyne Starling, jr., clerk of the supreme court of the State of Ohio, within and for the said county of Franklin, certify, that the foregoing transcript is truly and correctly copied, and taken from the records of said court, in my office.

Witness my hand and the seal of said court, at Columbus, this 29th day of December, A. D. 1843.

[SEAL.]

LYNE STARLING, JR., *Clerk.*

And the defendants in the above cause, by T. Ewing, their attorney, come and say, that in record and proceedings aforesaid there is manifest error, in this, to wit, that judgment was given therein for the plaintiffs, on the agreed case; whereas, by the law of the land, and by virtue of the act of Congress, entitled, " an act declaring the assent of Congress to

the act *of the act* of the general assembly of the State of Ohio, hereinafter recited," approved March 2d, A. D. 1831, the judgment ought to have been given for the defendants. Wherefore, the said defendants prays, a writ of error, to remove the said cause to the Supreme Court of the United States, and that said judgment be reversed, &c.

T. EWING, *Att'y for defendant.*

THE UNITED STATES OF AMERICA,

To the honorable, the judges of the supreme court of the State of Ohio, greeting:

I allow this writ of error.

JOHN McLEAN,
Justice supreme court U. States, 7th circuit.

Whereas, in the record and process, and also in the rendering judgment, in a certain action of assumpsit, which was in the said court, between the State of Ohio, plaintiff, and Neil, Moore & Co., defendants, manifest error hath intervened, as it is said, to the great damage of the said Neil, Moore & Co., as by their complaint we are informed; and we being willing that the error aforesaid (if any) be corrected, and full and speedy justice be done in this behalf to the said parties, command you, that the record, process, and judgment aforesaid, with all things touching the same, under your seals, distinctly and plainly, without delay, you send and certify to the judges of the Supreme Court of the United States, now in session, so that the judgment aforesaid being inspected, the court may further, for correcting the error aforesaid, do that which of right, and according to law, ought to be done.

Witness the honorable Roger B. Taney, chief justice of the United States of America, this 26th day of January, in the year of [SEAL.] our Lord one thousand eight hundred and forty-four, and in the 68th year of the American independence.

Attest, WM. MINER, *Clerk.*

THE STATE OF OHIO, *Franklin county, ss:*

In obedience to the foregoing writ, I herewith transmit to the Supreme Court of the United States, a certified transcript of the record and proceedings of the supreme court of the State of Ohio, in the plea in said writ of error mentioned.

In testimony whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of said court, at Columbus, this 29th day of January, A. D. 1844.

LYNE STARLING, JR.,
Clerk supreme court.

THE UNITED STATES OF AMERICA,

Supreme Court of the United States, to the State of Ohio, greeting:

Whereas, Neil, Moore & Co., have obtained the allowance of our writ to the supreme court of the *of the* State of Ohio directed, to remove